

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA M. TURNER**

Claimant

VS:

**WELCOME INN, INC.**

Respondent

AND

**TRAVELERS INSURANCE COMPANY**

Insurance Carrier

Docket No. 169,943

## ORDER

**ON** the 1st day of March, 1994, the application of both claimant and respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson on January 14, 1994, came on for oral argument by telephone conference.

## APPEARANCES

The claimant appeared by and through her attorney, Robert E. Southern, of Great Bend, Kansas. The respondent and insurance carrier appeared by and through their attorney, Jerry M. Ward, of Great Bend, Kansas. There were no other appearances.

# RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

## ISSUES

- (1) Did claimant meet with personal injury arising out of and in the course of her employment on December 14, 1991?

- (2) What is the nature and extent of claimant's injury and disability?
- (3) What is claimant's average weekly wage?
- (4) Is claimant entitled to additional temporary total disability compensation for the period May 15, 1992, through September 15, 1992?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant's injury to her right arm arose out of and in the course of her employment with Welcome Inn, Inc.

The claimant and her husband were hired to manage the Welcome Inn in Great Bend, Kansas. They were required by their contract of employment to remain on duty 24 hours a day with specific notice to the employer required any time they vacated the premises for any period of time.

On December 14, 1991, at approximately 11:00 PM, claimant decided to pop popcorn. It is acknowledged that the act of popping popcorn was for the claimant's own personal benefit and was not required or contemplated in her contract of employment with Welcome Inn, Inc.

The claimant, after pouring the oil into the pan and starting the stove, was interrupted by a business related telephone call. The telephone call lasted longer than the claimant had anticipated. Upon returning to the kitchen she discovered the oil had overheated and caught on fire. In attempting to put out the flames, both to protect herself and protect the premises she was managing, claimant suffered extensive burns to her right hand and arm. The third-degree burns on claimant's arm resulted in extensive scarring and limitation of motion in the hand, wrist and elbow.

The respondent provided information to indicate claimant spent extensive time on the telephone in the evenings, mainly with personal telephone calls, evidenced by two lengthy phone calls on December 13, 1991, as well as several hundred dollars worth of personal telephone bills during the months of January and February 1992. The claimant testified that the phone call on the night of the injury was related to the business of managing the Welcome Inn motel. The testimony of the claimant regarding the intent and purpose of the phone call on the night of the injury is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The respondent cites Holloway v. Consolidated Gas, Oil & Mfg. Co., 152 Kan. 129, 102 P.2d 987 (1940), in support of its denial of benefits to claimant. In Holloway, the claimant was fatally burned while building a fire in the family heating stove. The claimant, living in a two-story farm residence located on property owned by the respondent, was required in his employment contract to pump the oil off of two oil leases on property on which the house was located. While the residence was on the respondent's property, the maintenance of the residence itself was not part of the employment contract and the building of the fire for personal heat was not required as part of claimant's contract of

employment.

In the present case the crucial factor involves the causal connection between the employment related phone call and the claimant's injury. Holloway is distinguishable in that the claimant's attempt to look after his personal affairs, i.e., building a fire to heat the house for his family, did not arise out of and in the course of his employment. The answering of a business related phone call by the claimant in this matter and, after the fire started, the act of protecting the very property which was the subject of the employment contract does establish the required nexus between the work and the injury.

A more applicable case would be Gowan v. Harry Butler & Sons Funeral Home, 204 Kan. 210, 460 P.2d 606 (1969). In Gowan, the claimant, an employee of the funeral home, was required to keep the funeral home chapel clean and presentable, do dusting and light cleaning, answer the phone at all hours, answer the door bell and meet people who came to the door. As part of her job duties the claimant was required to be neat and presentable at all times. On the date of the injury the claimant spilled furniture polish on her clothes while dusting and polishing the funeral home. The claimant went to her apartment to change her clothes. While stepping out of her dress the claimant fell and broke her right hip. The court found that the broken hip arose out of and in the course of her employment with the respondent the fall occurred at a time when she was required to be neat and clean in anticipation of meeting guests.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all of the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The phrase "out of" the employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

"The phrase 'in the course of employment' relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service." Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Appeals Board finds the claimant has met her burden of proof that the injury to her right upper extremity from the burn on December 14, 1991, did arise out of and in the course of her employment with the respondent, Welcome Inn, Inc., and is compensable.

(2) What is the nature and extent of claimant's disability?

Attached to the proceedings for regular hearing dated September 10, 1993, were the medical records of Dr. Gary M. Jost, the authorized treating physician in this matter. Dr. Jost opined claimant suffered a five percent (5%) loss of function to the elbow as a result of restrictions in claimant's range of motion, and an additional two percent (2%) loss of function due to restrictions of motion to her thumb. Dr. Jost went on to opine claimant suffered a seventeen percent (17%) permanent partial impairment to the right upper extremity on a functional basis with the additional impairment stemming from problems associated with scarring from the burns. The record is void of additional evidence regarding claimant's impairment.

The respondent argues claimant should not be compensated for the scarring and contends claimant should be entitled only to an award based on the loss of range of motion to the elbow and the thumb. The Appeals Board respectfully disagrees. In Beal v. El Dorado Refining Company, 132 Kan. 666, 296 Pac. 723, (1931), the Supreme Court found that burns to a claimant's face and head were injuries distinct from the scheduled losses of sight and hearing and compensation was allowable for these injuries.

The American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, allows the evaluation and assessment of functional impairment if a scar involves the loss of sweat gland function, hair growth, nail growth or pigment formation and such loss has an effect on the performance of the activities of daily living. The guide further allows for loss of function due to sensory deficit, pain or discomfort in the scar area as well as loss of function due to the limitation of motion in the scar area. [Section 13.4).]

The Appeals Board concludes that compensation for scarring is appropriate in this case and based upon the uncontradicted medical opinion of Dr. Jost, awards claimant a seventeen percent (17%) impairment to her right upper extremity as a result of the injury of December 14, 1991.

(3) Claimant has an average weekly wage of \$138.46 per week.

The claimant and her husband were hired to manage the Welcome Inn motel. While the husband worked a full-time job away from the motel he nevertheless was involved on a daily basis in certain aspects of the employment including the heavier work involved in replacing sewer lines, and painting rooms, as well as in the daily responsibilities of answering the phone and managing the motel. The contract of employment called for payment to the claimant and her husband of \$650.00 per month the use of the house and the payment of utility costs by the employer. Uncontradicted evidence establishes the value of the use of the house to be \$450.00 per month with \$100.00 additionally for utilities. The total compensation package would thus be \$1,200.00 per month. Claimant argues that she did the majority of the work under the contract with Welcome Inn, Inc. and her average weekly wage should reflect same. While there is some indication that she may have been more actively involved in the management of the Welcome Inn, there is not sufficient evidence in the record for the Appeals Board to decipher which percentage of duties were attributable to the claimant's efforts and which were attributable to the efforts of her husband. As the husband had equal use of the house and utilities and as the evidence indicates both claimant and her husband were involved in the management of the motel, the Appeals Board finds the claimant's average monthly wage to be \$600.00. Six hundred dollars (\$600.00) multiplied by 12 months equals \$7,200.00, divided by 52 weeks equals \$138.62 per week, average weekly wage attributable to the claimant.

(4) Claimant is not entitled to temporary total disability compensation between the periods of May 15, 1992, and September 15, 1992.

K.S.A. 44-510c(a)(2) defines temporary total disability as follows:

"Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."

Uncontradicted evidence that the claimant continued in her employment with the respondent for several months after the date of injury, coupled with the claimant's admission that she immediately began seeking other employment upon termination of her employment with the respondent supports a finding that the claimant was not temporarily totally disabled between the period May 15, 1992, and September 15, 1992.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the

Award of Administrative Law Judge George R. Robertson dated January 14, 1994, is affirmed in all respects and that the claimant, Linda M. Turner, shall be and is awarded compensation against the respondent, Welcome Inn, Inc. and the insurance carrier, Travelers Insurance Company, for the injury of December 14, 1991.

Claimant is entitled to 35.70 weeks of compensation at the rate of \$92.31 per week for a seventeen percent (17%) loss of use of the right upper extremity making a total award of \$3,295.47, all of which is due and owing and ordered paid in one lump sum less any monies previously paid.

The Appeals Board further finds that any and all medical expenses incurred as a result of the claimant's injury of December 14, 1991, including any out-of-pocket expenses of the claimant are the responsibility of and are to be paid by the respondent.

The Appeals Board further finds claimant is entitled to future medical treatment upon application to and approval by the Director.

The Appeals Board further finds claimant is entitled to unauthorized medical if expended only upon presentation of an itemized statement verifying same.

The fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent as follows:

UNDERWOOD AND SHANE	
Transcript of Proceedings,	
Dated March 4, 1993	\$ 208.80
Deposition of Joseph Smith,	
Dated July 13, 1993	\$ 39.50
Deposition of Annette Smith,	
Dated July 13, 1993	\$ 237.70
TOTAL	\$ 486.00
OWENS, BRAKE & ASSOCIATES	
Transcript of Proceedings,	
Dated September 10, 1993	\$ 108.24

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Robert E. Southern, PO Box 936, Great Bend, Kansas 67530  
Jerry M. Ward, PO Drawer 2005, Great Bend, Kansas 67530  
George R. Robertson, Administrative Law Judge  
George Gomez, Director

## **MEMORANDUM**

**TO: DON RAMSAY**  
**FROM: GARY KORTE**  
**DATE: APRIL 8, 1994**  
**RE: TURNER V. WELCOME, INN, INC.**

Linda Turner should be included under the issues arising out of and in the course of, average weekly wage, and specifically a new heading "Compensability for Scars and Scarring/Burns".